Supreme Court of the United States

OCTOBER TERM, 1900.

No. 226.

FRANK M. FAIRBANK,

Plaintiff in Error,

vs.

THE UNITED STATES.

Brief for Plaintiff in Error.

STATEMENT.

Plaintiff in error (with the Northern Pacific Railway Company) was indicted, tried and convicted in the District Court of the United States for the District of Minnesota, of the charge of issuing, as agent of the railway company, an export bill of lading upon certain wheat exported from Minneapolis, Minnesota,

to Liverpool, England, through the port of Boston, Massachusetts, without affixing thereto an internal revenue stamp, as required by the war revenue act of June 13, 1898. Transcript, p. 3. In proper time and manner plaintiff in error objected at the trial to introduction of any evidence against him thereat "on the ground that the act of congress of June 13, 1898, commonly called the war revenue law, is void, in so far as it imposes a stamp tax on foreign bills of lading, upon the ground that to that extent it is in conflict with that provision of article one, section nine, of the constitution of the United States, which provides, 'No tax or duty shall be laid on articles exported from any state,'" and requested the court to so charge.

Both the objection and request to charge were overruled and an exception duly taken to each ruling. Transcript, p. 8.

The plaintiff in error was convicted and sentenced to pay a fine of twenty-five dollars. Transcript, p. 7.

To review the judgment, and solely upon the above stated constitutional ground, the writ of error has been sued out.

ASSIGNMENT OF ERRORS.

The court erred:

1. In overruling the objection to the introduction of any evidence under the indictment.

2. In refusing the request to charge.

Each of said assignments is based on the ground that that provision of the act of congress imposing a ten-cent stamp tax on export bills of lading is void as

contravening section nine of article one, of the constitution of the United States, which says, "No tax or duty shall be laid on articles exported from any state."

ARGUMENT.

We submit that the question is not an open one under the decisions of this court. We think the case is controlled by *Brown v. State of Maryland,* 12 Wheat. 419, and *Almy v. California,* 24 How. 169.

Brown v. Maryland was decided in 1827, and has always been followed and regarded as giving the true construction (so far as concerns any question here involved) to that clause of the constitution now in question.

The case was this, as stated by Tawney, C. J., in *Almy v. California*:

> "The state of Maryland, in order to raise a revenue for state purposes, among other things required all importers of certain foreign articles and commodities enumerated in the law, or other persons selling the same by wholesale, before they were authorized to sell, to take out a license, for which they should pay $50; and in case of refusal or neglect, should forfeit the amount of the license tax, and pay a fine of $100, to be recovered by indictment.
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> "Brown, who was an importing merchant, residing in Baltimore, refused to pay the tax, and was thereupon indicted in the state court, which sustained the validity of the state law, and imposed the penalty therein prescribed. This judgment was removed to this court by writ of error, and it will be seen by the report of the case that it was elaborately argued on both sides, and the opinion of the court, delivered by Chief Justice Marshall, shows that it was carefully and fully con-

sidered by the court. And the court decided that this state law was a tax on imports, and that the mode of imposing it, by giving it the form of a tax on the occupation of importer, merely varied the form in which the tax was imposed, without varying the substance."

The case therefore decides that a tax on the occupation of importer is a tax on imports.

Almy v. California involved a stamp tax imposed by the state of California upon bills of lading for gold or silver shipped to any place out of the state.

Mr. Benjamin argued that a stamp tax on the paper was not a tax on the export described in the paper. But this court said:

"If the tax was laid on the gold or silver exported, every one would see that it was repugnant to the constitution of the United States, which in express terms declares that 'No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'

"But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of a ship-master without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of

> the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance an effect, a duty on the article exported."

The case therefore decides that a stamp tax on a bill of lading is a tax on the goods described therein.

In *Woodruff v. Parham*, 8 Wall. 123, and *Pittsburg Coal Co. v. Louisiana*, 156 U. S. 590, it was held that the words "imports" and "exports" were used in the constitution of the United States as meaning articles shipped from or to a foreign country, and not articles shipped between the states. Therefore the one cent tax of the war revenue law upon interstate bills of lading is not obnoxious to this clause of the constitution.

It was held in *Woodruff v. Parham*, pp. 137-139, that *Almy v. California* was placed on the wrong ground; that as it involved a shipment from San Francisco to New York (not an export in the sense of this clause of the constitution) the decision should have been that the tax was invalid as being a burden on *interstate* commerce within *Crandall v. Nevada*, 6 Wall. 35. But the court reaffirms and repeats what was decided in *Almy v. California* to the point here involved, viz.: that a stamp tax on a bill of lading is a tax on the goods described therein. See p. 138.

> The question seems to us so well settled by the decisions of this court that it is unnecessary to go at length into the history of this provision, or the reasons

which actuated the framers of the constitution. But while believing it wholly unnecessary, we may be permitted to briefly indicate the history and purpose of the constitutional provision.

It is well known that all the provisions of the federal constitution respecting taxation were adopted after long and heated discussion and were compromises between widely opposing views and interests. The power of congress and the power of the states to levy duties on imports were discussed at length. The prevailing fear among the representatives from all the states was, that the power of taxation might be used to impose burdens upon certain states or sections at the expense of others. It was finally conceded that congress should have the power to levy taxes on imports, and the states should not. It was considered that the power of congress to tax imports could not be used or abused so as to oppress certain states or sections, for such a tax fell on the consumer wherever he resided. But the power to tax exports was prohibited to congress in the original draft of the constitution and was passed by a vote of seven states to four. 1 *Tucker on the Constitution*, pp. 334-335. *Story on the Constitution, sec.* 1015. This clause, however, did not pass without opposition, and several attempts were made to amend it, as by inserting after the word "duty" the words "for the purpose of revenue," and by inserting at the end of it, "unless by consent of two-thirds of the legislature;" both of which propositions were negatived. Judge Story says that the prohibition extends not only to exports, but to the exporter, citing *Brown v. Maryland.*

Mr. Tucker calls attention to the fact that the word "duty" applies to the article of export when it puts

on the character of an export; but lest there might be an evasion of the substantial purpose of the provision, the word "tax" was obviously added. So that the whole clause means that the taxing and duty power of the government should not be laid as a burden on the products of any of the states which are to be exported. 2 *Tucker on the Constitution*, pp. 659-660.

The obvious object of this provision is to prevent any possibility of applying the power to lay taxes so as to regulate commerce injuriously to the interest of any one state. If congress were allowed to lay a duty on exports, it was seen by the framers of the constitution that, inasmuch as the power to tax involves the power to destroy, this power might be used to seriously burden or even destroy the sale of the staple products of some one or more states. The inequality of such a tax would be extreme. In some of the states the whole of their means results from exports, in others very little or nothing is exported, and their wealth is derived from other sources. The burden of a tax on exports would therefore be very unequally distributed. The wealth of South Carolina may depend on exports of cotton, the wealth of Minnesota on exports of wheat, while Vermont or New Hampshire may export substantially nothing. An export tax therefore on cotton, or on wheat, would be borne entirely by the people of the states where those articles are produced. These were 'among the reasons which determined the framers of the constitution to prohibit congress from levying the least tax or duty in any form whatsoever on exports. *Story on the Constitution*, secs. 1014-1015-1016.

The next clause of the constitution is in harmony with this theory. It says:

> "No state shall, *without the consent of congress,* lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage."

In the adoption of the latter section, it was evidently considered that if a state desires to tax its own exports it may safely be permitted by congress to do so, provided the revenue derived therefrom shall be for the use of the treasury of the United States.

C. W. BUNN,

For Plaintiff in Error.